BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2019-390-E

IN RE: Ganymede Solar, LLC, Petitioner, Dominion Energy South Carolina, Inc., Respondent.	Dominion Energy South Carolina, Inc.'s Response in Opposition to Motion to Maintain Status Quo

Pursuant to S.C. Code Ann. Regs. § 103-829(A) and other applicable rules of practice and procedure of the Public Service Commission of South Carolina ("Commission"), Dominion Energy South Carolina, Inc. (formerly South Carolina Electric & Gas Company) ("DESC") responds in opposition to Ganymede Solar, LLC's ("Solar Developer") Motion to Maintain Status Quo, filed on December 20, 2019, in the above-referenced docket (the "Motion").[1] For the reasons set forth below, DESC respectfully requests that the Motion be denied.

BACKGROUND

Solar Developer plans to construct an approximately 75 MW solar generating facility that will be a Qualifying Facility as defined by Federal Energy Regulatory Commission ("FERC") Regulation 18 C.F.R. § 292.204. Solar Developer plans to sell the output of this facility to DESC. However, to date, Solar Developer has not entered into a power purchase agreement ("PPA") with DESC. Solar Developer and DESC entered into an Interconnection Agreement on May 7, 2018, which the parties amended on June 15, 2018 (as amended, the "IA"). A copy of the

[1] DESC is named as the Respondent in the Motion and the Petition filed simultaneously therewith.

IA is attached hereto as Exhibit 1 and incorporated herein. As memorialized in Appendix 4 of the IA, Solar Developer agreed to a series of project milestones detailing "critical" construction and payment milestones and responsibilities "as agreed to by the Parties." Importantly, Appendix 4 is a one-page document on which DESC and Solar Developer collaborated to create mutually-acceptable terms relating to these milestones.[2] In fact, the milestones contained within Appendix 4 are so crucial to the agreement that it requires the signature of the parties—just like the IA itself. Surely, these milestones were not entered into without contemplation.

The first and second milestone payment ("Milestone Payment 1" and "Milestone Payment 2") are among the milestones contained in Appendix 4. These equal payments represented the total estimated cost of certain facilities, equipment, and upgrades necessary to interconnect Solar Developer's project with DESC's system. Originally, the amounts of Milestone Payment 1 and Milestone Payment 2 were each set at $2,611,031.59. However, these amounts were amended by Solar Developer and DESC on June 15, 2018—approximately a month before the due date of Milestone Payment 1. The revised amount of each payment is now $2,340,100.00.[3] Solar Developer submitted Milestone Payment 1 in accordance with the IA. However, to date, Solar Developer has not submitted Milestone Payment 2, which was due on or before December 27, 2019. *See* IA at Appendix 4.

Instead, Solar Developer filed the Motion only seven days prior to the due date for Milestone Payment 2. In the Motion, Solar Developer seeks to preserve certain "[c]ontract

[2] The Petition incorrectly states that Solar Developer is operating under a PPA. Although the email correspondence attached hereto as Exhibit 3 and incorporated herein indicates that DESC provided to Cypress Creek a model PPA on April 26, 2018, for several projects—including Ganymede—Cypress Creek did not execute a PPA for this project. However, it did execute that version of the PPA for other projects at that time. Those PPAs included language regarding the VIC of which Solar Developer now complains. This demonstrates that Cypress Creek was aware of this VIC language at the time it was negotiating the due date for Milestone Payment 2.

[3] Solar Developer's Petition incorrectly states that the amount owed to DESC under Milestone Payment 2 is $2,611,031.59 rather than the lower amount agreed upon by the parties in the amendment. Likewise, the Petition similarly overstates the amount paid to DESC pursuant to Milestone Payment 1.

rights," but also calls for the Commission to modify the IA and grant an indefinite extension of the due date for Milestone Payment 2 as a result of "unintended consequences of recent decisions of this Commission." Motion at 1. Specifically, Solar Developer claims in its Petition (the "Petition"), filed simultaneously with the Motion, that the Commission's decision in Order No. 2019-847 on December 9, 2019 (the "VIC Order"), to approve an interim Variable Integration Charge ("VIC") of $2.29/MWh in DESC's power purchase agreements[4] has left Cypress Creek Renewables, LLC ("Cypress Creek")—Solar Developer's parent company—unable to obtain financing for the project in accordance with the IA. *See* Petition at 1 and 2. Solar Developer provides neither explanation nor support for its claim that the VIC Order, or any other Commission decision, rendered it unable to obtain financing—especially since Solar Developer has yet to execute a PPA.

As a result, the Motion asks the Commission to modify the IA and indefinitely extend the due date for Milestone Payment 2 in order to avoid the inevitable contractual termination of the IA. *See* Motion at 1; Petition at 4.

ARGUMENT

I. The Motion fails to set forth a basis for relief.

The Motion is not based in fact or law and fails to articulate a basis for maintaining a purported "status quo" that is in actual conflict with the terms of the IA. The Motion does not present "a concise and cogent statement of the facts" to the Commission or otherwise provide appropriate grounds to grant the requested relief. *See* S.C. Code Ann. Regs. § 103-829; *see also* South Carolina Rules of Civil Procedure ("S.C.R.C.P.") § 7(b)(1) (motions should "state with particularity the grounds therefor, and . . . the relief or order sought.").

[4] Contrary to Solar Developer's claims in the Petition, Solar Developer has not yet executed a power purchase agreement with DESC.

Nowhere does Solar Developer actually provide DESC or this Commission with tangible evidence of its efforts to obtain financing. Solar Developer has not (i) named any potential financing parties, (ii) cited any adverse communications received from a potential financing party as to the VIC Order—issued only 11 days before it filed the Motion and Petition, or (iii) proposed any action that, if taken by this Commission, would be sufficient for Solar Developer to obtain financing in accordance with the IA. Indeed, Solar Developer has not even laid out a discernible path forward to guide this Commission in its ruling or provided any rationale as to how more time would alleviate the project's current mismanagement. One would suspect that, at the very least, Solar Developer would provide a definitive timeline under which it could reasonably negotiate financing, and the steps by which it would obtain such financing pursuant to that timeline. Accordingly, Solar Developer only puts forth conclusory allegations in the Motion and the Petition because it is unable to produce any reliable support or evidence that the Commission's decisions, in the VIC Order or elsewhere, hindered any actual efforts to obtain financing in any way.

Instead, Solar Developer simply declares its IA should be modified by the Commission, while at the same time alleging that the Commission rendered its project "unfinanceable." Motion at 1. As a result, Solar Developer seeks to preserve certain of its "[c]ontract rights." *Id*. However, whatever contractual rights Solar Developer has in its IA, it surely does not have the right to unilaterally avoid its obligation to pay Milestone Payment 2 in accordance with the IA. Thus, it seems that what Solar Developer actually requests of the Commission is not a preservation of its contract rights, but a <u>modification</u> of those rights such that it may obtain an indefinite extension of the due date for Milestone Payment 2. Although DESC acknowledges that the Commission may modify certain rights of the parties with respect to the IA, this authority should be preserved for only those situations that further substantial public interests—such as

avoiding harm to the ratepayer—and not merely to step into the shoes of a sophisticated party and re-negotiate an interconnection agreement on such party's behalf.

Furthermore, Solar Developer's justification for such a modification is flawed. On one hand, Solar Developer declares the Commission rendered the project "unfinanceable" due to alleged uncertainty in the marketplace created by the Commission. *See* Motion at 1; Petition at 1. However, the VIC Order actually quantified (i.e., made certain) an interim value for the VIC in DESC's PPAs. Thus, Solar Developer's argument of alleged "uncertainty" is incongruous with the VIC Order. Importantly, although the Petition states that Solar Developer's PPA allows DESC to impose a VIC upon Solar Developer, Solar Developer has not yet executed a PPA with DESC. In fact, neither Solar Developer nor Cypress Creek has reached out to DESC regarding a PPA for this project since approximately July of 2018. Whatever effects the VIC Order may have on Solar Developer's potential PPA seems to be pure conjecture, as Solar Developer has not provided DESC or this Commission with any specific facts as to how potential changes in an agreement it has yet to execute has impacted potential financing parties. As an alternate argument, Solar Developer claims that it merely needs more time "to arrange financing"—an argument made in obvious conflict with its prior claims. Petition at 4.

As a result, it appears that Solar Developer either had a speculative project or simply mismanaged the logistics and corresponding timeline for its project—a fact that finds no basis for relief under the IA. Because of Solar Developer's failure to allege facts or provide an adequate basis for relief, the Commission should deny the Motion as a matter of law.

II. Continuation of the status quo through an indefinite extension of Milestone Payment 2 is in conflict with the IA and will bring harm to other interconnection customers.

Pursuant to Appendix 2 of the IA, Solar Developer agreed to:

> [P]ay the estimated Interconnection Facilities and Upgrades, in Appendix 6, which together total $4,680,200.00. This amount is the basis for the Milestone Payments in Appendix 4 of this Agreement. Failure to make the payment may result in the termination of the Generator Interconnection Agreement and the withdrawal of the Generator Interconnection Application.[5]

The requirements in the IA, including Appendix 2 and Appendix 4, are plain, and the intent is clear—Milestone Payment 2 should be made in accordance with the terms of the IA or termination may result. The IA does not state that Solar Developer is bound to pay Milestone Payment 2 only if Solar Developer obtains financing by the due date. Although FERC precedent does not necessarily bind this Commission, it can be instructive, and the FERC cited precisely this issue when addressing similar circumstances—"[a]n interconnection customer's difficulties in securing funding do not exempt it from meeting the obligations that it agreed to when it executed the [interconnection agreement]." *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,053, at P 30 (2014). Indeed, the due date for Milestone Payment 2 was freely negotiated by Solar Developer (a sophisticated party affiliated with a large, sophisticated solar developer) and contains no contingencies related to financing or the VIC Order. If the Commission were to read-in contingencies to the milestones in Appendix 4—a document that, as discussed above, was negotiated freely and scrutinized carefully—where there were none negotiated by the parties, all interconnection agreements executed under this Commission's jurisdiction would be called into question and the industry as a whole would be thrown into chaos. Thus, the IA does not, and cannot, provide relief to Solar Developer as a result of its failure to obtain financing by the due date it negotiated for Milestone Payment 2.

Additionally, Section 6.2 of the IA requires Solar Developer to "immediately notify [DESC] of the reason(s) for not meeting the milestone" (emphasis added) and propose the earliest

[5] Not only were these obligations contained in the original agreement, but they were also reiterated in Amendment One to the agreement, which was executed on June 15, 2018.

date by which it can meet such milestone. However, the Petition indicates that Solar Developer has been operating under this "uncertainty" since February of 2019. *See* Petition at 1. Yet, from February of 2019, until the filing of the Motion and Petition, DESC was not notified by Solar Developer or Cypress Creek that it would not meet Milestone Payment 2, and Solar Developer has yet to propose another date upon which it plans to submit Milestone Payment 2.

Furthermore, DESC must administer its queue in a comparable, non-discriminatory manner. Indeed, S.C. Act No. 62 of 2019 ("Act 62") strikes at the heart of this issue, and commands the Commission promulgate certain interconnection standards that "provide for efficient and timely processing . . . and are fair, reasonable, and non-discriminatory with respect to interconnection applicants, other utility customers, and electrical utilities." S.C. Code Ann. § 58-27-460(A)(3). Although these standards will be addressed by the Commission in an upcoming docket, the issues here are of the type the Commission must mitigate pursuant to its mandate under Act 62—a developer seeking preferential treatment that, if granted, would create queue delays and harm other applicants, customers, and the utility itself. As such, DESC cannot simply amend the IA to modify the milestone payment schedule (i) in a preferential manner or (ii) contrary to the express terms of the IA. Solar Developer is not uniquely impacted by the VIC Order or any related Commission decision, and it does not allege any special or unique circumstances which justify disparate treatment from other similarly-situated developers.

Assuming *arguendo* that the Commission grants the Motion and the Petition and modifies the IA to indefinitely extend the due date for Milestone Payment 2, the resulting harm would be felt not only by DESC, but also by DESC's other interconnection customers. The FERC opined that such extensions might present harm to later-queued interconnection customers in the form of uncertainty, cascading restudies, and shifted costs if the project is removed from the queue at a later date. *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 147 FERC ¶ 61,198 (2014) (stating

the FERC's goal of "discouraging speculative or unviable projects from entering the queue [and] getting projects that are not making progress toward commercial operation out of the queue"). For these reasons, the FERC has approved termination of interconnection agreements where the interconnection customer failed to make interconnection payments. *See, e.g.*, *Pacific Gas & Electric Co.*, 146 FERC ¶ 61,120 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,114 (2013).

If (i) DESC modified the IA or (ii) the Commission indefinitely extended the due date for Milestone Payment 2 pursuant to the Motion, it would render these agreements meaningless and create an opportunity for developers to flood the Commission with modification requests upon every order issued by the Commission. Therefore, not only would an extension under these circumstances harm other customers and run contrary to FERC precedent, it would also create a dangerous precedent.

III. Solar Developer is in default under the IA and improperly requests that the Commission grant injunctive relief to stay termination rights arising from such default.

As discussed above, Solar Developer did not submit Milestone Payment 2 on or before December 27, 2019—the due date under the IA. Not only does Appendix 2 under the IA make clear that missing the due date for Milestone Payment 2 "may result in termination of the [IA]," but Solar Developer's own Petition also notes that "[u]nless the Commission modified the Milestone payment schedule, the Project will be terminated." Petition at 4. As such, DESC submitted a default notice (attached hereto as Exhibit 2 and incorporated herein) to Solar Developer on December 30, 2019, in accordance with Section 7.6.1 of the IA. The default notice advised of Solar Developer's (i) default under the IA resulting from its failure submit Milestone Payment 2 on or before December 27, 2019, and (ii) right to cure such default under Section 7.6.1 of the IA by submitting Milestone Payment 2 on or before January 7, 2020.

In hopes of avoiding termination of the IA as a result of missing a due date that it negotiated, Solar Developer requests that the Commission stay DESC's termination rights arising under the IA as a result of Solar Developer's default. Indeed, Solar Developer does not truly seek to maintain status quo with its Motion because if the status quo were maintained, Solar Developer would remain obligated to submit the entire amount of Milestone Payment 2 to DESC, which should have been submitted on December 27, 2019. The Motion is, in fact, a request for injunctive relief because it requests for the Commission to modify the due date for Milestone Payment 2, which would essentially enjoin the termination of the IA. *See Powell v. Immanuel Baptist Church*, 199 S.E.2d 60, 61 (1973) (stating that "[t]he sole purpose of an injunction is to preserve the status quo"). However, the Commission recently confirmed that nowhere in its statutory authority is the Commission given the ability to grant such injunctive relief. *See* Order No. 2019-521. As such, the Motion should be denied on this ground alone.

Given that Solar Developer is currently in default and the Commission is not empowered to grant injunctive relief, $2,340,100.00 is currently due and payable to DESC pursuant to the IA. If this amount is not received by DESC on or before January 7, 2020, DESC currently intends to terminate the IA pursuant to Section 7.6.2 and reserves all rights it has under the IA.

CONCLUSION

For the reasons stated above, the Motion should be denied.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

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Cayce, South Carolina
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This is to certify that I, Ashley Cooper, have this day caused to be served upon the person named below the ***Response in Opposition to Motion to Maintain Status Quo*** by electronic mail and by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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/s/ J. Ashley Cooper

This 30th day of December, 2019